In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1918

JOSE JESUS PEREZ-LOPEZ AND EUGENIO PEREZ-LOPEZ, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the government did not prove that evidence produced at their deportation hearing was untainted by previous allegedly illegal conduct of immigration agents.

1. After a deportation hearing before a special inquiry officer of the Immigration and Naturalization Service ("INS") in San Francisco, petitioners, who are brothers, were ordered deported to Mexico. The deportation order was affirmed by the Board of Immigration Appeals (Pet. App. B) and by the Court of Appeals for the Ninth Circuit (Pet. App. A).

The special inquiry officer had previously terminated deportation proceedings against petitioners on the ground that the government's case was based on tainted evidence

(R. 154-168).[1] The facts relating to the manner in which the evidence was obtained are set forth in detail in the decision of the special inquiry officer (R. 156-159). Briefly, he found that on-the-street questioning by immigration officers resulted in petitioners' *legal* arrest, but that the officers later made an illegal search of petitioners' residence, and seized documents that were used as leads to obtain evidence from INS and State Department files, which, in turn, were used to establish that petitioners were in the United States illegally. The special inquiry officer suppressed these latter documents as tainted by the illegal seizure. He also held that petitioners' post-arrest admissions of their true names and place of birth could not be used to establish deportability because the admissions were obtained after petitioners' detention had become unlawful under 8 C.F.R. 287.3 (R. 185).

About a month after the termination of the proceedings and before the decision of the special inquiry officer could be reviewed by the Board of Immigration Appeals, the INS received an anonymous letter (Exhibit 16, R. 111, 113-114) stating that petitioners were in the United States illegally, and giving their residence and place of employment. INS agents went to petitioners' home address and spoke to their mother and the wife of petitioner Jose Perez-Lopez. Both women gave statements to the investigators which revealed the true names and birthplace of petitioners (R. 115, 117).

At the reopened hearing, the INS introduced the letter and the statements of the two women (R. 111); the investigating officer and the two women also testified

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[1] "R." refers to the certified administrative record which was filed in the court of appeals.

(R. 44-73, 75-99, 99-107). The special inquiry officer ruled that the INS had established its case by untainted evidence; that is, that the statements of the two women would ultimately have put the INS in possession of the same evidence from its files and State Department files that it introduced against petitioners earlier in the deportation hearing.

2. The special inquiry officer found that the INS receives many letters, anonymous and otherwise, informing on aliens whom the writers believe are in the country illegally, and that when these letters appear to have some substance they are investigated (R. 39). The Board of Immigration Appeals found (Pet. App. B 7):

> There is nothing in this record which would indicate that the anonymous letter was inspired by the [Immigration and Naturalization] Service.

Since the record shows that the anonymous letter was independent of the previous alleged illegality,[2] the deportation can be sustained on two independent grounds. First, as the court of appeals noted (Pet. App. A 3), once the INS proved by the statements of the mother and wife that petitioners were aliens, the burden of proof shifted to petitioners to prove the time, place, and manner

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[2] It is difficult to see how the INS could do more to prove that the letter was untainted. A further requirement of proof would mean, as the Board of Immigration Appeals pointed out (Pet. App. B 7), that petitioners would achieve what is tantamount to permanent residence in this country merely because the INS at one time may have acted illegally in assembling evidence of their deportability.

However, we do not concede that the immigration officers acted illegally; to the contrary, we argued vigorously in the court of appeals that the conduct of the immigration officers was proper (C.A. Br. 9-19). But since the court of appeals found it necessary to reach that issue (Pet. App. A 2), we do not discuss it.

of entry and that they are legally in this country. *Ah Chiu Pang* v. *Immigration and Naturalization Service,* 368 F. 2d 637, 639 (C.A. 3), certiorari denied, 386 U.S. 1037. Petitioners did not sustain this burden.

Secondly, since the anonymous letter would inevitably have led the INS to procure the documentary evidence introduced at the first hearing, that evidence was no longer tainted and could be used to prove petitioners' deportability. The applicable standard is that "the fruit of unlawful evidence may nevertheless be admitted if the government demonstrates that the evidence would have come to its attention from an independent source" *(United States* v. *Nagelberg,* 434 F. 2d 585, 587 (C.A. 2), certiorari denied, 401 U.S. 939). The court of appeals in this case found (Pet. App. A 3):

> The anonymous letter started a new investigation which, without any prior information, would have led to the incriminating evidence. See *United States* v. *Nagelberg*, 434 F. 2d 585, 587 (2d Cir. 1970), *cert. denied,* 401 U.S. 939 (1971).[3]

The immigration and State Department documents alone[4] established that petitioners entered the United States as visitors and remained longer than their visas permitted (Pet. App. B 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[3]As the court of appeals noted (Pet. App. A 4), it would have been an idle act to require the INS to obtain these same documents a second time.

[4] Petitioners do not challenge the sufficiency of the evidence.